IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

MANUEL D. PEGUERO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether a convicted defendant who was aware of his right to appeal his sentence and elected not to appeal may have his sentence set aside on a motion under 28 U.S.C. 2255 because the sentencing court failed to comply with the requirement of Federal Rule of Criminal Procedure 32 that the court advise the defendant of his appellate rights.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-4a) is unreported, but the judgment is noted at 142 F.3d 430 (Table). The opinion and order of the district court denying petitioner's motion under 28 U.S.C. 2255 (Pet. App. 7a-28a) is also unreported.

JURISDICTION

The judgment of the court of appeals was entered on February 27, 1998. Pet. App. 5a-6a. The petition for a writ of certiorari was filed on May 26, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a plea of guilty, petitioner was convicted of conspiracy to distribute cocaine, in violation of 21 U.S.C. 846. He was sentenced to 274 months of imprisonment, to be followed by five years of supervised release. Pet. App. 13a-14a. Petitioner took no direct appeal. Pet. App. 14a. In December 1996, more than four years after judgment was imposed, petitioner filed a motion under 28 U.S.C. 2255 challenging his conviction and sentence. The district court denied the motion, Pet. App. 7a-27a, and the court of appeals affirmed. Pet. App. 1a-6a.

1. On April 3, 1990, a grand jury in the Middle District of Pennsylvania indicted petitioner for conspiracy to distribute cocaine and to possess cocaine with intent to distribute it, in violation of 21 U.S.C. 846 (Count One); possession of cocaine with intent to distribute it, in violation of 21 U.S.C. 841(a)(1) (Count Two); possession, within 1,000 feet of a school, of cocaine with intent to distribute it, in violation of 21 U.S.C. 841(a) and 845a (Count Three); and conspiracy with a minor to distribute cocaine, in violation of 21 U.S.C. 845b (Count Four). Pet. App. 9a. In a written plea agreement, petitioner agreed to plead guilty to Count One of the indictment, and the government agreed to move for a sentencing departure on his behalf if he provided substantial assistance to law enforcement. Pet. App. 9a-11a; C.A. App. 59-71; Presentence Report 1.

On April 22, 1992, petitioner appeared for sentencing. Although the sentencing range prescribed for petitioner under the

federal Sentencing Guidelines was 292 to 365 months of imprisonment, the district court imposed a sentence of 274 months.[1] C.A. App. 190-192; see also Pet. App. 13a-14a. The government did not move for a downward departure based on petitioner's cooperation because he had been untruthful in his debriefing interview. C.A. App. 188. In sentencing petitioner, the district court failed to notify him of his right to appeal his sentence. Pet. App. 2a. Petitioner did not file an appeal. Ibid.

2. On December 10, 1996, petitioner filed a pro se motion under 28 U.S.C. 2255 to set aside his conviction and sentence. Pet. App. 7a-8a; C.A. App. 17-29. After the district court appointed counsel to represent him, petitioner filed an amended motion alleging that the district court had violated Federal Rule of Criminal Procedure 32(a)(2) by failing to inform petitioner of his right to appeal his sentence.[2] Pet. App. 8a; C.A. App. 74-77.

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[1] In sentencing petitioner below the Guidelines range, the district court relied on Sentencing Guidelines § 5G1.3, which applies when the defendant is subject to an undischarged term of imprisonment for a different offense. In this case, petitioner was on bail pending resolution of New Jersey state narcotics charges when the federal offense was committed. Petitioner ultimately received a ten-year sentence for that offense. Although the district court could have made a portion of petitioner's federal sentence concurrent with his state sentence under Section 5G1.3, the court instead imposed a consecutive sentence and granted defendant a small departure below the minimum sentence specified by the Guidelines. Pet. App. 13a-14a.

[2] At that time, the rule provided, in relevant part:

> There shall be no duty on the court to advise the defendant of any right of appeal after sentence is imposed following a plea of guilty or nolo contendere, except that the court shall advise the defendant of any right to appeal his sentence.

(continued...)

The amended motion requested that petitioner's sentence be vacated and that the case be listed for resentencing, a procedure that would result in the reinstatement of petitioner's appellate rights. Pet. App. 2a; C.A. App. 76.

At an evidentiary hearing on the motion, petitioner's former counsel, Rex Bickley, testified that he had informed petitioner of his right to appeal on the day of the sentencing hearing and had offered to represent him. Petitioner declined to take an appeal, however, preferring instead to cooperate with the government in an attempt to reduce his sentence. Pet. App. 2a, 15a-17a; C.A. App. 94-95, 113. Bickley further testified that, in the year after petitioner's sentencing, he received five or six letters from petitioner stating that petitioner wanted to provide information to the government, and none of those letters expressed any desire to take an appeal. C.A. App. 114-115. Petitioner also testified at the hearing and asserted that he informed his counsel at the moment of sentencing that he wanted to appeal. In addition, petitioner testified that shortly after sentencing, a fellow prisoner wrote a letter to petitioner's attorney, requesting that an appeal be taken. Pet. App. 18a-19a; C.A. App. 128-129, 146-148.

In a memorandum opinion dated July 1, 1997, the district court denied petitioner's Section 2255 motion. Crediting the testimony of petitioner's counsel, the court found that petitioner did not want to appeal but chose instead to seek a sentence reduction in

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[2](...continued)
That provision now appears in revised form at Federal Rule of Criminal Procedure 32(c)(5).

exchange for his cooperation. Pet App. 20a-21a. Accordingly, the court rejected petitioner's claim under Federal Rule of Criminal Procedure 32. The court ruled that, because petitioner actually knew of his right to appeal and chose not to exercise it, he could not raise the claim in a Section 2255 motion. Pet. App. 25a (citing United States v. Timmreck, 441 U.S. 780, 784 (1979)). The district court granted petitioner a certificate of appealability, limited to the Rule 32 issue. C.A. App. 215.

The court of appeals affirmed. Pet. App. 1a-4a. Citing the Eighth Circuit's decision in McCumber v. United States, 30 F.3d 78, 79 (8th Cir. 1994), the court concluded that the failure to inform the defendant of his appellate rights is "harmless error" if the government can show by clear and convincing evidence that the defendant knew of his right to appeal. Pet. App. 3a. Because "it is clear that [petitioner] knew of his right to appeal" even without reliance on his former counsel's testimony, the court concluded that the sentencing court's failure to advise petitioner of that right was "harmless and thus does not justify collateral attack by [petitioner]." Pet. App. 4a.

ARGUMENT

Petitioner does not challenge the factual findings of the district court, affirmed by the court of appeals, that he knew of his appellate rights and elected to forgo an appeal. Rather, petitioner contends that, despite his actual knowledge of his rights, any violation of the notice requirement of Rule 32 requires that his sentence be vacated without inquiry into whether the

violation prejudiced him. There is no merit to petitioner's contention.

1. a. A claim that the district court violated a non-constitutional procedural rule is not cognizable in a motion under 28 U.S.C. 2255 absent a showing that the violation is "a fundamental defect which inherently results in a complete miscarriage of justice, [or] an omission inconsistent with the rudimentary demands of fair procedure." Hill v. United States, 368 U.S. 424, 428 (1962). In Hill, this Court held that violation of Rule 32's requirement that the sentencing court afford the defendant an opportunity to make a statement on his own behalf before sentencing is not cognizable in a Section 2255 motion. Id. at 428-429. The Court noted that the defendant was not affirmatively denied the right to speak and did not claim any prejudice from the violation -- there was no suggestion that the sentencing court was misinformed or uninformed as to any relevant circumstances because of the defendant's failure to speak, and "there [wa]s no claim that the defendant would have had anything at all to say if he had been formally invited to speak." Id. at 429.

In United States v. Timmreck, 441 U.S. 780 (1979), this Court reaffirmed the principle enunciated in Hill. The Court ruled that a conviction based on a guilty plea is not subject to collateral attack simply because Rule 11 of the Federal Rules of Criminal Procedure was violated when the plea was accepted. Id. at 783. In Timmreck, the district court failed to advise the defendant that his guilty plea would subject him to a five-year term of special

parole. This Court rejected as unreasonable any claim that the failure "resulted in a 'complete miscarriage of justice' or in a proceeding 'inconsistent with the rudimentary demands of fair procedure'" because the defendant did "not argue that he was actually unaware of the special parole term or that, if he had been properly advised by the trial judge, he would not have pleaded guilty." Id. at 784.

Petitioner's claim here is analogous to the claims rejected by this Court in Hill and Timmreck. Like the defendants in those cases, petitioner alleges no more than a formal violation of a procedural rule that caused him no prejudice. Petitioner claims only that the sentencing court omitted to advise him of his right to appeal his sentence. Any contention that the omission resulted in a "miscarriage of justice" or was "inconsistent with the rudimentary demands of fair procedure" is untenable, because petitioner, who was represented by counsel, was aware of his right to appeal and chose not to appeal. Cf. Reed v. Farley, 512 U.S. 339 (1994).

b. Indeed, because petitioner suffered no prejudice from the procedural violation, he would be entitled to no relief under conventional principles of harmless error analysis. Federal Rule of Criminal Procedure 52(a) provides that "[a]ny error, defect, irregularity or variance which does not affect substantial rights shall be disregarded." That Rule generally requires actual prejudice to the accused before reversal for procedural error is warranted. See Bank of Nova Scotia v. United States, 487 U.S. 250,

254-257 (1988); United States v. Mechanik, 475 U.S. 66, 71-72 (1986); United States v. Lane, 474 U.S. 438, 448-449 (1986); United States v. Hasting, 461 U.S. 499, 509 (1983). In Lane, the Court rejected the notion that procedural errors can be categorically predetermined as "harmless" or "prejudicial." The Court stated:

> [O]n its face, Rule 52(a) admits of no broad exceptions to its applicability. Any assumption that once a 'substantial right' is implicated it is inherently 'affected' by any error begs the question raised by Rule 52(a). Assuming there is a 'substantial right,' the inquiry remains whether the error 'affects substantial rights' requiring a reversal of the conviction. That kind of inquiry requires a review of the entire record.

474 U.S. at 448 n.11. On collateral review, principles of finality require an even higher showing to obtain reversal. See United States v. Frady, 456 U.S. 152, 166 (1982). Even a constitutional violation does not justify reversal unless the error "had a substantial and injurious effect or influence" on the verdict or sentence. Brecht v. Abramson, 507 U.S. 619, 623 (1993).

There is no reason to disregard harmless error analysis simply because Rule 32 contains a "bright-line" notification provision. The fact that Rule 32 is designed to avoid a time-consuming inquiry into whether defendants have been advised of their right to appeal in each case does not mean that, on those rare occasions in which the Rule is not followed, the consequence is automatic reversal. If a court can conclude that the purposes underlying the Rule have been served in a particular case, such that the defendant has suffered no prejudice, there is no reason to grant any relief at all. That is true when, as in this case, the defendant is aware of his right to appeal but makes a fully informed decision not to

appeal.[3] Although there was a technical violation of Rule 32 because petitioner received knowledge of his right to appeal from counsel rather than the court, petitioner's substantial rights were not affected by the violation, and the error was therefore harmless.

2. As petitioner notes, several courts of appeals have held that violation of Rule 32's notification requirement constitutes per se reversible error, even if the record shows that a convicted defendant was actually aware of his appellate rights. See Thompson v. United States, 111 F.3d 109, 110 (11th Cir. 1997); United States v. Sanchez, 88 F.3d 1243, 1247 (D.C. Cir. 1996); Reid v. United States, 69 F.3d 688, 689-690 (2d Cir. 1995); United States v. Butler, 938 F.2d 702, 703 (6th Cir. 1991) (per curiam); Paige v. United States, 443 F.2d 781, 782 (4th Cir. 1971); United States v.

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[3] This Court's decision in Rodriquez v. United States, 395 U.S. 327 (1969), is not to the contrary. Rodriquez dealt with the question whether a defendant who was deprived of his right to appeal because of his counsel's failure to file a timely notice of appeal was required to "show some likelihood of success on appeal" in order avoid characterization of the error as harmless. Id. at 330. The Court held that the likelihood of success was irrelevant in determining whether a defendant had been harmed by the deprivation of his right to appeal. Ibid. In rejecting the government's argument that the Court should remand the case so that the district court could obtain an affidavit from the defendant's counsel explaining why no notice of appeal was filed, the Court noted that the district court had failed to inform the defendant of his right to appeal and to request that the clerk file a notice of appeal. Id. at 331. Unlike in this case, however, there was no finding in Rodriquez that the defendant elected not to pursue an appeal. On the contrary, this Court reasoned that if the defendant had "known that the clerk would file a notice of appeal, he could easily have avoided the difficulties he has faced." Id. at 332. The Court in Rodriquez therefore had no occasion to consider whether a violation of Rule 32's notice requirement that does not prejudice the defendant constitutes harmless error.

Deans, 436 F.2d 596, 599 n.3 (3d Cir.), cert. denied, 403 U.S. 911 (1971); United States v. Benthien, 434 F.2d 1031, 1032 (1st Cir. 1970); see also Biro v. United States, 24 F.3d 1140, 1142 (9th Cir. 1994) (endorsing per se approach except when the defendant expressly waives his right to appeal); Everard v. United States, 102 F.3d 763, 766 (6th Cir. 1996) (per se rule does not apply when defendant knowingly and voluntarily waives his right to appeal), cert. denied, 117 S. Ct. 1011 (1997). Those decisions do not harmonize their results with this Court's decisions in Hill and Timmreck, precluding relief under Section 2255 for purely technical violations of procedural rules. Nor do they address cases such as Bank of Nova Scotia, Mechanik, Lane, and Hasting, in which this Court has rejected rules of automatic reversal in favor of case-by-case determinations whether a particular procedural violation has prejudiced the defendant. See, e.g., Thompson, 111 F.3d at 110; Sanchez, 88 F.3d at 1246-1247; Reid, 69 F.3d at 689; Biro, 24 F.3d at 1142; Butler, 938 F.2d at 703-704.[4]

Other courts have held that the district court's failure to advise the defendant of his right to appeal at sentencing does not warrant relief under Section 2255 if the defendant is otherwise

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[4] Three of those decisions -- Benthien, Deans, and Paige -- predate Timmreck. In addition, Benthien and Deans relied on McCarthy v. United States, 394 U.S. 459 (1969), in which this Court held that a trial court's failure to comply with the notice requirement of Rule 11 was per se reversible error. As the Eighth Circuit explained in United States v. Drummond, 903 F.2d 1171, 1173 & n.5 (1990), cert. denied, 498 U.S. 1049 (1991), Congress overturned McCarthy when it amended Rule 11 in 1983 to provide that "[a]ny variance from the procedures required by this rule which does not affect substantial rights shall be disregarded." See Fed. R. Crim. P. 11(h).

aware of his right to appeal. Tress v. United States, 87 F.3d 188, 189-190 (7th Cir. 1996); United States v. Drummond, 903 F.2d 1171, 1173-1175 (8th Cir. 1990), cert. denied, 498 U.S. 1049 (1991); see also United States v. Garcia-Flores, 906 F.2d 147, 148-149 (5th Cir. 1990) (applying harmless error test to violation of Rule 32 when judge informed defendant of right to appeal at rearraignment, two months before sentencing); Hoskins v. United States, 462 F.2d 271, 274-275 (3d Cir. 1972) (no relief required when judge informed defendant of right to appeal at the conclusion of trial, seven weeks before sentencing).

Although there is a conflict among the courts of appeals, the disagreement is not of sufficient importance to justify this Court's review. District courts almost always notify defendants of their appellate rights at sentencing. On the rare occasion when the district court omits to provide that notification, defense counsel is likely to do so, as petitioner's counsel did here. In any case, the government can avoid the error by reminding the court of its obligation. Thus, although the per se approach adopted by some courts of appeals is incorrect, it does not seriously threaten the finality of federal convictions.

Moreover, litigation regarding the issue presented by this case is likely to diminish in the future as a result of the Anti-Terrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (the Act). First, Section 105 of the Act amended Section 2255 to impose a one-year limitations period on motions filed under Section 2255. That provision may further

reduce the small number of cases in which a defendant who was actually aware of his appellate rights seeks relief under Section 2255 because the district court failed to comply with Rule 32. See, e.g., Pet. App. 15a (noting that petitioner filed his Section 2255 motion "some four-and-one-half years after his sentence"); Drummond, 903 F.2d at 1172 (petitioner challenged conviction under Section 2255 six years after sentencing); Thompson, 111 F.3d at 110 (collateral challenge to 1988 conviction reached court of appeals in 1997).

Second, Section 102 of the Act amended 28 U.S.C. 2253 to require a prisoner to obtain a "certificate of appealability" before appealing from a district court's denial of his Section 2255 motion. A certificate of appealability may be issued "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. 2253(c)(2). Because a technical failure to comply with Rule 32's notification requirement does not deny the defendant any constitutional rights, Drummond, 903 F.2d at 1174, litigation brought by defendants over such failures in the future should be confined exclusively to the district courts.[5] The

[5] Indeed, a final consideration counseling against review in this case is that the court of appeals should not have reached the merits of the case because petitioner should not have received a certificate of appealability. Petitioner's request for a certificate (which the government did not oppose) failed to characterize the Rule 32 issue as "constitutional" but merely argued that it was a question "on which reasonable jurists differ." Defendant's Request for Certificate of Appealability 3. Likewise, although the district court's order granting a certificate of appealability identified the Rule 32 claim as the sole issue for appeal, C.A. App. 215, the court failed to consider whether that claim raised a substantial constitutional issue. See Young v. (continued...)

recent changes to the scope of federal collateral review thus provide a further reason why a grant of certiorari to review the narrow issue presented here is not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[5](...continued)
United States, 124 F.3d 794, 798-799 (7th Cir. 1997) (court must indicate in the certificate itself the specific issue or issues as to which petitioner has made a "substantial showing of the denial of a constitutional right"), cert. denied, 118 S. Ct. 2324 (1998).

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CERTIFICATE OF SERVICE

It is hereby certified that all parties required to be served have been served copies of the **BRIEF FOR THE UNITED STATES IN OPPOSITION** by first class mail, postage prepaid, on this 2nd day of September 1998.

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